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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. CARLOS ROBLES, Petitioner.	2 CA-CR 2010-0046-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20050205

Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

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K E L L Y, Judge.

¶1 A jury found petitioner Carlos Robles guilty of one count each of first-degree murder and attempted first-degree murder for fatally shooting one man and

attempting to shoot another. The trial court sentenced him to natural life in prison for the murder followed by a presumptive term of 10.5 years in prison for the attempted murder. Robles appealed the convictions and prison terms imposed, and this court affirmed. *State v. Robles*, No. 2 CA-CR 2006-0080 (memorandum decision filed Oct. 11, 2007). He then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., which the trial court denied without an evidentiary hearing. On review, Robles contends the trial court abused its discretion when it dismissed, without an evidentiary hearing, his Rule 32 petition in which he had claimed trial counsel was ineffective in several regards, both during trial and at sentencing. We will not disturb the trial court's summary denial of post-conviction relief absent a clear abuse of the court's discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007); *see also State v. Freeland*, 176 Ariz. 544, 552, 863 P.2d 263, 271 (App. 1993) (it is for trial court to determine, in exercise of its discretion, whether defendant has raised a colorable claim for relief warranting an evidentiary hearing).

¶2 "The trial court need only conduct an evidentiary hearing where the defendant has raised a colorable claim for relief." *State v. Boldrey*, 176 Ariz. 378, 380, 861 P.2d 663, 665 (App. 1993). To present a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Jackson*, 209 Ariz. 13,

¶ 2, 97 P.3d 113, 114 (App. 2004), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). And if a defendant fails to make a sufficient showing on either element of the *Strickland* test, the court need not determine whether the other element was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶3 Robles first claims trial counsel was ineffective because he "acted as a neutral observer at sentencing, and wrongly advised Robles not to speak at sentencing." He maintains, as he did below, that counsel should have presented more personal information about Robles and his past in order "to mitigate [his] prior convictions." Trial counsel is presumed to have acted properly unless a petitioner can show that counsel's decisions were not tactical, "but, rather, revealed ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). "Matters of trial strategy and tactics are committed to defense counsel's judgment" and cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988).

¶4 Here, as the trial court pointed out, the state submitted an affidavit from trial counsel stating he had advised Robles not to make a statement at sentencing because "he still faced potential jeopardy in this case" and in another matter that had been dismissed without prejudice. Counsel also averred he had not asked for a mitigation hearing due to his concern the state would present aggravation evidence about the dismissed case at such a hearing. Thus, we agree with the trial court's conclusion that trial counsel's decisions were tactical and were not unreasonable or the result of ineptitude. *See Goswick*, 142 Ariz. at 586, 691 P.2d at 677.

¶5 Robles maintains, however, that counsel's tactical decisions were unreasonable and that the trial court concluded otherwise only because counsel had not been subject to cross-examination at a hearing. Robles does not, however, make any argument as to what evidence would have been adduced through cross-examination. Rather, citing *State v. Smith*, 136 Ariz. 273, 665 P.2d 995 (1983), Robles argues that failing to present mitigation information at sentencing "is prima facie evidence of ineffectiveness." But in *Smith*, trial counsel had advised Smith not to give any information about the crimes to the presentence investigator or to present mitigation evidence. *Smith*, 136 Ariz. at 279, 665 P.2d at 1001. The *Smith* court ruled counsel had been ineffective because, contrary to counsel's advice, Rule 26.6(d)(2), Ariz. R. Crim. P., protects a defendant's statements to presentence investigators from being used as evidence of guilt. *Smith*, 136 Ariz. at 279, 665 P.2d at 1001. Additionally, *Smith* was a capital case wherein "proof of a single aggravating factor, absent sufficient mitigation, mandates the death penalty." *Id.* *Smith* is thus distinguishable from this case and we therefore cannot say the trial court abused its discretion in determining that counsel's tactical sentencing decisions here were reasonable and that "counsel's representation of [Robles] at the sentencing hearing was not deficient." *See State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985) ("The accused must . . . overcome a 'strong' presumption that the challenged action was sound trial strategy under the circumstances.").

¶6 Robles next maintains counsel was ineffective in several respects during trial. He first argues counsel was ineffective because "he failed to move to strike a juror

for cause" and did not "exercise a peremptory strike" to remove the juror. During voir dire, when Robles's counsel was asking about Robles's right not to testify, one of the prospective jurors stated:

> I just feel if I did not do it I would be the first one up there to tell you that I didn't do it. And I would want to tell you my side of the story. And if they don't, then they are hiding something. And I would be telling everybody that I know. And even though I can tell you it wouldn't make any difference, down deep inside it would.

Counsel explained to the juror that defense attorneys counsel their clients not to testify "based on many things," that he had recommended Robles not testify, and that the decision was really counsel's. He then asked the prospective juror if he would "understand that and not hold it against [Robles]." The prospective juror stated he would not, "based on everything I heard on that," but also said he thought "there would be a little part of me thinking he should have been up there" and that he would like to hear the defendant say he had not committed the crime. After this discussion a bench conference off the record was held and the potential juror was ultimately seated on the jury.

¶7 Although the juror admitted he thought Robles should testify, based on his belief that an innocent man would do so, he also stated he would not hold Robles's failure to testify against him in determining guilt. Thus, as the trial court concluded, "the juror's statements do not reveal that he held negative views about [Robles's] guilt or innocence, but simply a strong desire or curiosity to hear directly from [him]." And, as the trial court pointed out in its ruling on Robles's petition, at trial the court had instructed the jurors: "The defendant is not required to testify. The decision on whether

or not to testify is left to the defendant, acting with the advice of an attorney. You must not let this choice affect your deliberations in any way." We presume jurors follow the instructions they are given. *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006). Additionally, Robles does not address whether counsel's decision not to strike this juror was based on strategic decisions arising from the answers given by other perspective jurors during voir dire. Thus, we cannot say the trial court abused its discretion in concluding that Robles had "fail[ed] to present a reasonable probability that the juror held a negative view of [his] innocence or that the juror's presence on the jury prejudiced his defense."

¶8 Robles also contends counsel should have requested "a limiting instruction about Robles's teardrop tattoo." During voir dire, one of the potential jurors, who worked for the border patrol, asked to come to the bench after being asked if anything about his work "would cause [him] to favor one side or the other." At the bench, the juror said "I notice he has a teardrop tattoo, I assume that means he has killed somebody." After he admitted his assumption that Robles had killed someone might affect his ability to make a fair decision, the trial court excused him.

¶9 Robles argues "it is likely all jurors saw [the tattoo]" and "[i]t is likely all had opinions about what it meant." He maintains counsel was ineffective because he failed to request a limiting instruction telling the jury not to speculate about the tattoo's meaning because it was not relevant to the case. Again, "[m]atters of trial strategy and tactics are committed to defense counsel's judgment" and cannot serve as the basis for a claim of ineffective assistance of counsel. *Beaty*, 158 Ariz. at 250, 762 P.2d at 537. And,

in any event, as the trial court concluded, Robles's argument that another juror may have noticed the tattoo or had ideas about its meaning is purely speculative and, therefore, the trial court did not abuse its discretion in ruling that Robles had "sustained no prejudice from defense counsel's decision not to request a limiting instruction on his tattoo."

¶10 Additionally, according to Robles, "counsel was ineffective in failing to argue that the act was not premeditated." Here again, however, Robles objects to a tactical decision by counsel as to how to present his defense. The trial court concluded that counsel "may have reasoned that pursuing an alternate theory would diminish his best defense" and that there was "no evidence that [counsel's] strategy was unreasonable." We agree. *See Gerlaugh*, 144 Ariz. at 455, 698 P.2d at 700.

¶11 Next, Robles asserts "counsel was ineffective when he incorrectly argued what constitutes first-degree murder." In his closing argument, counsel told the jury: "If you think he pointed that gun and shot, that is first degree murder." Although this statement by counsel did not properly state the law relating to first-degree murder, *see* A.R.S. § 13-1105, the trial court did not abuse its discretion in determining that even if the statement had prejudiced Robles to some degree, there was "no reasonable probability that the outcome of the trial could have been different had [counsel] not made this error."

¶12 First, immediately before making the above statement, counsel said, "I don't have an obligation to tell you what happened that night . . . and I am not going to talk to you about what first degree murder is, or attempted first degree murder." During the prosecutor's closing argument, he properly explained first-degree murder and the differences between that offense and second-degree murder. And, the trial court

instructed the jury on first-degree murder as well, explaining its elements and the meaning of premeditation.

¶13 In a related argument, Robles further alleges counsel was ineffective because, by failing to argue lack of premeditation and by incorrectly stating the law of first-degree murder, counsel essentially "conceded that if the jury found Robles committed the offense, it was first-degree murder." But, as noted above, the decision to defend Robles on the grounds he had not committed the offense at all, rather than on the alternate ground of lack of premeditation, was a tactical decision which we cannot say was unreasonable. *See Gerlaugh*, 144 Ariz. at 455, 698 P.2d at 700.

¶14 Robles also maintains counsel should have agreed to a reckless manslaughter jury instruction.[1] But, we cannot say the trial court abused its discretion in concluding "the evidence did not support a finding of recklessness" and that a reckless manslaughter instruction, therefore, would have been inappropriate. Thus, even assuming arguendo counsel should have acquiesced to the state's request for such an instruction, Robles has not demonstrated he was prejudiced by counsel's failure to do so. *See Strickland*, 466 U.S. at 687.

¶15 Finally, Robles has not persuaded this court the trial court abused its discretion by rejecting his claim that "counsel's errors cumulatively prejudiced [him]." The trial court noted counsel's performance had been below the applicable standard "in only one instance: misstating the law of first-degree murder." The court concluded,

[1]We note that when the possibility of such an instruction was being discussed, trial counsel stated that Robles had not wanted counsel "to request that lessers be given."

however, that, as it had previously found in its order denying relief, "the impact of this short statement was minimal and did not prejudice Petitioner's defense." The record supports the trial court's ruling; Robles failed to raise a colorable claim and the court did not abuse its discretion.

Disposition

¶16 Finding no abuse of the trial court's discretion in summarily dismissing Robles's petition of post-conviction relief, we grant review but deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge